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No. 261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SOUTHERN FARMS, INC.,
Petitioner

vs.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your petitioner, Southern Farms, Inc., petitions that a writ of certiorari be issued to review the final judgment rendered by the United States Court of Appeals for the Fifth Circuit in cause numbered 19,193 on the Docket of said Court, styled "Arthur J. Goldberg, Secretary of Labor, United States Department of Labor, Appellant, vs: Southern Farms, Inc., Appellee", and also the order entered by said Court denying petition for rehearing filed in said cause by this petitioner.

CITATIONS TO OPINIONS DELIVERED IN THE COURTS BELOW

1. The opinion of the United States District Judge for the Greenville Division of the Northern District of

Mississippi is not officially reported. A copy of this opinion appears in the appendix hereto as Exhibit A and also at page 74 of the record prepared for the United States Court of Appeals, nine printed copies of which are filed with this petition.

2. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 301 F. 2d 130. Copy of this opinion appears in the appendix hereto as Exhibit B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was dated and entered March 30, 1962. It appears in the appendix hereto as Exhibit C.

The order of the United States Court of Appeals for the Fifth Circuit denying this petitioner's petition for rehearing was dated and entered April 27, 1962. A copy of this order appears in the appendix hereto as Exhibit D.

The jurisdiction of this Court to review said judgment and order is conferred by 28 U. S. C. sections 1254 and 2101(c).

QUESTIONS PRESENTED FOR REVIEW

1. The sole relief sought by the respondent in the District Court was an injunction against petitioner. The District Court denied the injunction on each of two separate grounds. Each ground was sufficient in itself to support the judgment denying the injunction. The Court of Appeals held that the District Court was in error as to one of these grounds but was not in error as to the other ground. Nevertheless the Court of Appeals did not affirm the judgment of the District Court but on the contrary reversed and remanded it. The question is whether or not the Court of Appeals, having found the judgment

to be supported by one ground assigned by the District Court, was obligated by decisions of this Court and by the accepted and usual course of judicial proceedings to affirm the judgment of the District Court.

2. Whether the Court of Appeals erred in reversing the findings of the District Court that Greenwood Egg Company was a farm assembler and that it was also an establishment through which eggs customarily moved and that petitioner was exempted from compliance with the Fair Labor Standards Act of 1938 as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 et seq.) by 29 USC section 213 (a) (10), and the Secretary of Labor's regulation thereunder appearing as Section 536.2 in 29 Fed. Code Reg.

3. Whether the Court of Appeals erred in finding that one of petitioner's egg suppliers, Greenwood Egg Company, was not a farm assembler or an establishment through which eggs customarily moved within the meaning of the above mentioned regulation because its truck collected eggs more than 50 miles from petitioner's office, because Greenwood Egg Company's office and employees were in the same building as petitioner, because it used petitioner's assembly facilities in that building, and because it does not maintain a plant where it assembles eggs but brings the eggs in its trucks directly to petitioner, and then, on the basis of this conclusion, holding that petitioner was not exempt from compliance with the Fair Labor Standards Act.

STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

The pertinent provision of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended, is Section 13 of the Act (29 USC Sec. 213 (a) (10)) as follows:

"13 (a) The provisions of Section 6 and 7 shall not apply with respect to. . . . (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; . . ."

The Secretary of Labor's regulation under the above statute defining the term "area of production" as used in said statute appears as Section 536.2 in 29 Federal Code Regulations. The pertinent portion of the regulation is the following:

"§ 536.2 'Area of production' as used in section 13 (a) (10) of the Fair Labor Standards Act

(a) An individual shall be regarded as employed in the 'area of production' within the meaning of section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment: . . .

(iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, poultry or eggs—50 miles; or . . .

(b) For the purposes of this section:

(1) 'Open country or rural community' shall not include any city, town or urban place of 2,500 or greater population or any area within:

(i) One air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) Three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000 or

(iii) Five airline miles of any city with a population of 500,000 or greater according to the latest available United States Census.

"(2) The commodities shall be considered to come from 'normal rural sources of supply' within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances . . ."

STATEMENT OF THE CASE

The respondent instituted this suit against petitioner in the United States District Court for the Northern District of Mississippi under the authority of Section 17 of the Fair Labor Standards Act (29 U. S. C. 217). The sole relief sought therein was an injunction restraining petitioner and all persons acting on behalf of petitioner from violating the Fair Labor Standards Act of 1938 as amended.

Petitioner contended in the District Court and in the Court of Appeals that respondent was not entitled to the injunction for each of two separate reasons: (a) because petitioner was exempt from complying with the Fair Labor Standards Act by Section 13 (a) (10) of said Act (29 U. S. C. 213 (a) (10)) and the above mentioned regula-

tion issued by the Secretary of Labor pursuant thereto defining the term 'area of production' as used in the statute; and also (b), because although petitioner in good faith believed that it was exempt from the said Act, it nevertheless, when informed that the Secretary of Labor contended petitioner was not exempt, promptly and long before the filing of this suit brought itself into full compliance with the Fair Labor Standards Act, intended to continue to comply with it, and there was no probability that petitioner would violate the Act in the future. (R. 6-9)

The District Court heard the evidence on both defenses and decided both of them in favor of petitioner.

The District Court first found and decided that even if petitioner was not exempt from the Act, no injunction should issue because petitioner "in good faith believed" (as did the District Judge) that it was exempt from the Act but nevertheless, when the Secretary of Labor made the contention that petitioner was not exempt, the petitioner promptly and before this suit was filed brought itself into full compliance with the Act and "I find as a fact that it is probable that the defendant will continue in the future to comply fully with the provisions of the Fair Labor Standards Act."

The District Court then further found that no injunction should issue for the additional reason that the petitioner was exempt from the said Act.

The District Judge stated that he was finding on both issues "for the sole purpose of giving the Court of Appeals my entire views with respect to this, so that in the event of an appeal, and they disagree with my disposition, they would not have to send it back for further proceedings here, but could dispose of it there." (R. 74-6)

The judgment of the District Court, as distinguished from its opinion, also specifically found that petitioner

was exempt from the Fair Labor Standards Act and further that even if petitioner was not exempt from the Act, an injunction should not issue; and on the basis of each of these two findings, the judgment of the District Court denied respondent any relief and dismissed the complaint. (Ex. E in appendix hereto and P. 10 of record)

The respondent appealed to the United States Court of Appeals for the Fifth Circuit, which held that the District Court was in error in its finding that petitioner was exempt from the Fair Labor Standards Act but that the District Court was not in error in its other finding that an injunction should not issue even if the appellee was subject to the Act. Although the Court of Appeals held that the judgment of the District Court was sustained by its finding that no injunction should issue even though petitioner was not exempt from the Act, nevertheless the Court of Appeals, acting contrary both to the decisions of this Court and customary judicial practice, failed to affirm the judgment of the District Court, but on the contrary reversed and remanded the cause to the District Court for further proceedings.

There was no dispute about the facts bearing on whether or not petitioner was exempt from the Act and those facts are:

The agreed statement of facts dictated into the record on the trial was that petitioner was located in a rural community (Itta Bena, Mississippi), was engaged in purchasing, grading, and selling eggs, and had made regular shipments of eggs to other states; and that the facts with reference to petitioner's operations are such that it and its employees are exempt under the statute and the above mentioned regulation from complying with the Fair Labor Standards Act unless the facts with reference to petitioner's purchase of eggs from Kilmichael Feed Mill (hereinafter called Kilmichael), Denton Manufacturing Company (hereinafter called Denton), and Greenwood Egg

Company (hereinafter called Greenwood) made them subject to the Act.

Kilmichael, Denton and Greenwood are all located in rural communities within 50 airline miles of petitioner's establishment at Itta Bena, and all eggs sold by them to petitioner came from normal rural sources of supply within 50 miles of Itta Bena except that some of Denton's eggs were produced by a flock of chickens about 52 miles from Itta Bena, some of Kilmichael's eggs came from a flock located slightly more than 50 miles from Itta Bena, and some of Greenwood's eggs came from flocks located more than 50 miles away.

The sole issue on this point was correctly stated by respondent's brief in the Court of Appeals as follows:

> "The issue therefore is whether the eggs from out-of-area farms, in excess of the 5% tolerance, come to the defendant (petitioner) through 'farm assemblers or other establishments through which the commodity customarily moves', which are themselves located within the 50 mile limit."

In other words if Kilmichael, Denton and Greenwood are "farm assemblers or other establishments through which the commodity customarily moves" then petitioner is not subject to the Act.

Denton is the business name of J. M. Denton who has an ice plant at Shelby, Mississippi. He brings the eggs produced by his own chickens and the eggs that he buys from other producers to his ice plant, recases some of the eggs, sells some of the eggs to cafes and other people, and sends some of them by his truck to petitioner at Itta Bena.

Kilmichael is the business name of C. S. Brown who has a place of business at Kilmichael, Mississippi. He brings the eggs produced by his own chickens and the eggs that he buys from other producers to his establish-

ment where he assembles and loads them on his trucks and delivers them to petitioner and other purchasers.

The Court of Appeals decided that petitioner was not exempt from the Act solely on the basis that Greenwood was not a "farm assembler or other establishment through which the commodity customarily moves."

Greenwood is a partnership composed of James C. Morgan and Henry Orsborn. Each of them is one of the seven or more stockholders of petitioner. Greenwood maintains its office at Itta Bena, Mississippi, in the same building in which petitioner is located. It has and pays full time employees in this office, and from it conducts its business and pays the producers of the eggs that it buys. It also has other employees, including truck drivers. It produces eggs and also buys eggs in large quantities. It sells eggs in large quantities to others than petitioner. The eggs that Greenwood produces and those that it buys are collected from farms by its trucks which deliver some of them to purchasers other than petitioner and sells and delivers some of them directly to petitioner at Itta Bena. The only assembly facilities that Greenwood has are its employees, trucks and assembly facilities in conjunction with petitioner's facilities at Itta Bena.

It is undisputed that the above is the customary method in Mississippi of handling the egg business.

ARGUMENT

1. In not affirming this case the United States Court of Appeals for the Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Inasmuch as the Court of Appeals found that the District Court's judgment refusing to issue an injunction was supported by one of the grounds therefor assigned by the

District Court, is was obligated both by the decisions of this Court and by the accepted and usual course of judicial proceedings to affirm that judgment.

The only possible reason for reversing and remanding the case to the District Court would be so that the District Court could decide whether or not to issue the injunction even though petitioner was not exempt from the Act; but that question has already been specifically tried and decided by the District Court and not reversed by the Court of Appeals. There is therefore no judicial reason for remanding the case to the District Court. There is nothing further for it to adjudicate.

As stated by this Court in United States vs. Silliman, 6 Wheat. 598, 5 L. Ed. 340:

> "The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed."

In Helvering vs. Gowran, 302 U. S. 238, 82 L. Ed 224, 58 Sup. Ct. 154, this Court stated and held:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co., 256 U. S. 208, 65 L. Ed. 892, 41 S. Ct. 451; United States v. American R. Exp. Co., 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560; United States v. Holt State Bank, 270 U. S. 49, 56, 70 L. Ed. 465, 469, 46 S. Ct. 197; Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; Stelos Co. v. Hosiery Motor-Mend Corp., 295 U. S. 237, 239, 79 L. Ed. 1414, 1416, 55 S. Ct. 746; cf. United States v. Williams 278 U. S. 255, 73 L. Ed. 314, 49 S. Ct. 97."

In Riley Investment Company vs. Commissioner, 311 U. S. 55, 85 L. Ed. 36, 61 Sup. Ct. 95, this Court again stated and held:

> "Where the decision below is correct it must be affirmed by the Appellate Court though the lower tribunal gave a wrong reason for its action."

In Brown vs. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 Sup. Ct. 397, this Court again quoted the above language with approval.

In Securities & Exchange Comm. v. Chenery Corporation, 318 U. S. 80, 63 S. Ct. 654, 87 L. Ed. 626, this Court stated the reason for the rule thus:

> "The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."

2. Petitioner is exempt from the Fair Labor Standards Act.

It is patent, and apparently not disputed, that both Denton and Kilmichael are either farm assemblers or establishments through which the commodity customarily moves, or both. If Greenwood falls within either of these categories, then petitioner is exempt from the Act.

Inasmuch as Greenwood's sole business is assembling eggs from farms by collecting them in its trucks and disposing of them, it would appear that Greenwood is a farm assembler. The regulation does not require that a farm assembler have any particular assembly facilities, and it does not prohibit eggs from being assembled, i.e. brought together, by means of a truck. Indeed, it is difficult to imagine any other practical method by which eggs can be assembled from farms, and the evidence shows that this is the method customarily followed in Mississippi.

Inasmuch as Greenwood's established place of business (an office and full-time employees) is within the 50 mile limit, it is not disqualified because it sends its trucks beyond the 50 mile limit to collect eggs. The regulation (Section 536.2) plainly states that the commodities shall

be considered to come from normal rural sources of supply within the specified distance from the establishment if they are received either from farms within such specified distances or from farm assemblers or other establishments through which the commodity customarily moves, which are themselves within such specified distances. The regulation clearly provides that if the assembler or other establishment is itself located within the specified distance it can collect eggs from beyond that distance.

We submit the undisputed evidence shows that Greenwood is an establishment through which the commodity customarily moves. It is a business establishment dealing in eggs for it has a fixed place of business at Itta Bena with employees and property used in the egg business, and it customarily collects, buys and sells eggs.

The regulation does not anywhere, by inference or otherwise, disqualify Greenwood from being an establishment through which the commodity customarily moves because its partners are among the stockholders of petitioner or because it has its office in the same building as does petitioner or because it uses assembly facilities in conjunction with petitioner, or because its trucks deliver eggs to petitioner without first physically depositing them in its own office; and we can think of no good reason why Greenwood should not be permitted to operate as economically as possible by having its office in the same building as petitioner, by sharing with petitioner some of the facilities in that building, and by not performing the useless labor of taking the eggs into its own office before taking them into petitioner's office. In any event the regulation as written does not attempt to prohibit or require these things, and we submit that, if the regulation is to be amended so as to incorporate these features and take away the exemption granted by Congress, it should be amended by the Secretary of Labor and not by the Court of Appeals. We submit further that until the regu-

lation is so amended this petitioner and those in similar circumstances have a right in conducting their business to rely on the statute and regulations as written.

Respectfully submitted,

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Of Counsel for Petitioner

Of Counsel:
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Exhibit "A"

Opinion of United States District Court for the Greenville Division of the Northern District of Mississippi

The Court:

Gentlemen, I am going to dispose of this case in what may appear to be a rather awkward way, for the sole purpose of giving the Court of Appeals my entire views with respect to this, so that in the event of an appeal, and they disagree with my disposition, they would not have to send it back for further proceedings here, but could dispose of it there.

There is no question but that a substantial part of the eggs handled by the defendant move in commerce. After the first investigation in October of 1959, there was no contention on the part of the Secretary of Labor that the defendant's operations required compliance with the Fair Labor Standards Act except with respect to the egg-breaking part of the operation, which was promptly discontinued.

At that time, with respect to the rest of the operation, plaintiff's investigator and the defendants both believed that the defendants' remaining operation was exempt under the provisions of Section 13(a)(10) of the Act.

When the investigation of July 1960 showed that the flocks from which the eggs came,—a sufficient number of them,—were located more that fifty miles away from the plant at Itta Bena, so that by that method of calculation, more than five percent of the eggs handled by the defendants were, in fact, produced more than fifty airline miles away from the plant, and when that was developed, the Secretary of Labor then, for the first time, contended that the defendant was required to comply with the Fair Labor Standards Act.

Promptly after this contention was made, the defendant attempted to comply fully with the provisions of the Act and did so beginning on the 24th of August, 1960, except for two clerical employees; and full compliance for all employees was attained on September 28, 1960. This is so, although the defendant, in good faith, believed then and still continues to believe that it is not legally required to comply with the Act.

I find as a fact that there was at no time during either of the investigations any effort on the part of defendant to conceal, and there was in fact no concealment.

I find as a fact that it is probable that the defendant will continue in the future to comply fully with the provisions of the Fair Labor Standards Act.

With these fact findings, even if I concluded that coverage applied and no exemption was available to the defendant, I necessarily would have to find that this situation did not require the issuance of an injunction and, in fact, would not permit the issuance of an injunction.

But I find as a fact that all of the eggs that are handled by the defendant either come from flocks located on farms within fifty miles of Itta Bena, or come to the defendant from farm assemblers or other establishments through which poultry or eggs customarily move, which are, in fact, themselves located within fifty airline miles of the plant of the defendant, and in open country or a rural community.

With that finding, I find as a conclusion of law that the Act, by its provisions and regulations promulgated thereunder, give to these defendants in their present type of operation, an exemption under Section 13(a)(10) of the Act.

As a conclusion of law, the plaintiff is not entitled to the relief prayed for and prayer for injunction will be and is denied.

You may either hand me the order next week when I will be back here the latter part of the week or mail it to me in Tupelo for entry in accordance with these findings.

Let me say again, gentlemen, I went at it through the back door in order that the Court of Appeals might have the benefit of my views on all issues of fact and conclusion of law that might, by either view, be applicable to the situation.

Anything else to come up this afternoon? If not, Court is adjourned.

Exhibit B

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19193

ARTHUR J. GOLDBERG, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

versus

SOUTHERN FARMS, INC., APPELLEE.

Appeal from the United States District Court for the Northern District of Mississippi

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(March 30, 1962)

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge: The Secretary of Labor sued to enjoin Southern Farms, Inc., from violating the provisions of the Fair Labor Standards Act as amended.[1] Southern Farms, Inc., is engaged in purchasing, candling and selling eggs at Itta Bena, Mississippi. It regularly ships eggs in interstate commerce, but contends that the wage benefits

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[1] Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201, et seq.

of the Act do not apply to its employees because they are engaged in handling agricultural commodities for market, and are so "employed within the area of production (as defined by the Secretary)."[2]

The district court found that the evidence sustained that contention, and hence that Southern Farms, Inc., had not been in violation of the Act. The district court expressed the further opinion "that, even should the business conducted by said defendant come within the provisions of the Act, an injunction should not issue."

The primary question is whether Southern Farms' employees are "employed in the area of production" as that term has been defined by the Secretary.[3] To be so em-

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[2] The pertinent provision of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. 201, et seq., is as follows:

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy product; . . ."

[3] The pertinent part of 29 Fed. Code Reg. 536.2 reads as follows:

"Sec. 536.2 *'Area of production' as used in section 13(a) (10) of the Fair Labor Standards Act.*

"(a) An individual shall be regarded as employed in the 'area of production' within the meaning of Section 13 (a) (10) of the Fair Labor Standards Act in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

"(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply

ployed an employee who handles eggs must be employed in an establishment in which 95% of the eggs come either from farms within a 50-mile area, or from "farm assemblers or other establishments through which the commodity customarily moves."

It was stipulated that more than 5% of the eggs handled at Southern Farms' plant in Itta Bena come from flocks of hens on farms more than 50 airmiles from Itta Bena. The parties agree on their statement of the issue. "The issue therefore is whether the eggs from out-of-area farms, in excess of the 5% tolerance, come to the defendant through 'farm assemblers or other establishments through which the commodity customarily moves', which are themselves located within the 50-mile limit."

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located not more than the following air-line distances from the establishment:

"(i) With respect to the ginning of cotton—10 miles;

"(ii) With respect to operations on fresh fruits and vegetables—15 miles;

"(iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

"(iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

"(b) For the purposes of this section:

"(1) 'Open country or rural community' shall not include any city, town or urban place of 2,500 or greater population or any area within:

"(i) One air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000.

"(2) The commodities shall be considered to come from 'normal rural sources of supply' within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances."

The out-of-area eggs are supplied to Southern Farms by Greenwood Egg Company and two other suppliers. Between September 1959 and July 1960 the eggs supplied by Greenwood alone accounted for more than 20% of the eggs handled by Southern Farms. Greenwood collects in its truck eggs from a number of its different farms, buys eggs produced on other farms, and hauls them to Itta Bena. Greenwood is a partnership, and its two partners are also stockholders in Southern Farms. One of the Greenwood partners testified that, "the only assembly facilities Greenwood Egg Company has as such would be in conjunction with Southern Farms facilities."

Since Greenwood's truck collects eggs beyond the 50-mile area, the truck cannot qualify as a "farm assembler" or an "establishment through which" the eggs move within the specified distance. The Greenwood partner who testified readily admitted that Greenwood does not maintain a plant where it assembles eggs and that its truck driver brings the eggs not to Greenwood Egg Company but to Southern Farms at Itta Bena. That being true, it is not material that he further testified, "We have full-time employees there at the office (of Southern Farms), paid by Greenwood Egg Company." Very clearly, we think, the evidence failed to establish that Greenwood was a "farm assembler" or "other establishment" through which the eggs customarily move within the specified distance. We hold that the district court erred in concluding that Southern Farms was exempt from the wage provisions of the Act under Section 13(a)(10).

The Secretary questions the findings of fact from which the district court concluded that, in any event, an injunction should not issue.[4] Those findings are not clearly

[4] "When the investigation of July 1960 showed that the flocks from which the eggs came, — a sufficient number of them — were located more than fifty miles away from the plant at Itta Bena, so that by that method of calculation, more than five percent

erroneous. Rule 52(a), Federal Rules of Civil Procedure. Under such findings, while the judgment must be reversed, the district court, in its discretion, may decline to issue an injunction.[5] The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

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of the eggs handled by the defendants were, in fact, produced more than fifty airline miles away from the plant, and when that was developed, the Secretary of Labor then, for the first time, contended that the defendant was required to comply with the Fair Labor Standards Act.

"Promptly after this contention was made, the defendant attempted to comply fully with the provisions of the Act and did so beginning on the 24th of August, 1960, except for two clerical employees; and full compliance for all employees was attained on September 28, 1960. This is so, although the defendant, in good faith, believed then and still continues to believe that it is not legally required to comply with the Act.

"I find as a fact that there was at no time during either of the investigations any effort on the part of defendant to conceal, and there was in fact no concealment.

"I find as a fact that it is probable that the defendant will continue in the future to comply fully with the provisions of the Fair Labor Standards Act.

"With these fact findings, even if I concluded that coverage applied and no exemption was available to the defendant, I necessarily would have to find that this situation and, in fact, would not permit the issuance of an injunction."

[5] Compare Mitchell v. Pidcock, m/s, 5 Cir., No. 18687, decided Feb. 5, 1962; Mitchell v. Ballenger Paving Co., m/s, 5 Cir., No. 18714, decided Feb. 6, 1962.

Exhibit C

JUDGMENT.

Extract from the Minutes of March 30, 1962

No. 19193

ARTHUR J. GOLDBERG, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

versus

SOUTHERN FARMS, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court.

* * * *

Exhibit D

FILED 27th day of April 1962

/s/ Edward W. Wadsworth
Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19193

ARTHUR J. GOLDBERG, Secretary of Labor,
United States Department of Labor, APPELLANT,

versus

SOUTHERN FARMS, INC., APPELLEE.

Appeal from the United States District Court for the
Northern District of Mississippi.

(April 27, 1962)

ON PETITION FOR REHEARING OF APPELLEE
Before RIVES, BROWN and WISDOM, Circuit Judges.

PER CURIAM:

The petition for rehearing of appellee in the above-styled and numbered cause is hereby

DENIED.

Exhibit "E"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, GREENVILLE DIVISION

Civil Action No. G-C-48-60.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF,

v.

SOUTHERN FARMS, INC., DEFENDANT.

This cause having come on to be heard on this the 17th day of February, 1961, and the Court having heard and considered all of the testimony and evidence adduced by the parties and being fully advised in the premises is of the opinion that the business conducted by the defendant, Southern Farms, Inc., is within the "Area of Production" exemption of the Fair Labor Standards Act. Further, the Court is of the opinion that even should the business conducted by said defendant come within the provisions of the Act, an injunction should not issue.

It is, therefore,

ORDERED:

That the plaintiff is denied any relief and that the complaint herein shall be and the same is hereby dismissed with prejudice.

This the 17th day of February, 1961.

CLAUDE F. CLAYTON.
(Claude F. Clayton),
District Judge.

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AUG 16 1962
JOHN F. DAVIS, CLERK

No. [illegible]

In the Supreme Court of the United States

[illegible]

[illegible]

v.

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 261

SOUTHERN FARMS, INC., PETITIONER

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18–22) was reported at 301 F. 2d 130. The opinion of the district court (Pet. App. 15–17) is reported unofficially at 44 Lab. Cases ¶ 31,235.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1962 (Pet. App. 23), and appellee's petition for rehearing was denied on April 27, 1962 (Pet. App. 24). The petition for a writ of certiorari was filed on July 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner's major supplier of eggs was not a "farm assembler or other establishment through which the commodity customarily moves" within the meaning of the Secretary's regulations and therefore petitioner was not within the area of production entitling it to an exemption from the Fair Labor Standards Act.

2. Whether the court of appeals, having rejected the district court's determination that petitioner was exempt from the Act, erred in reversing and remanding the cause to the district court to determine whether an injunction should issue prohibiting petitioner from violating the Act, where the district court had stated that it would refuse an injunction on discretionary grounds.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), and the regulations issued under the Act, 29 C.F.R. 536.2, are set forth at pages 3 through 5 of the petition.

STATEMENT

The Secretary of Labor brought this action to restrain petitioner from continuing to violate the Fair Labor Standards Act. Petitioner is engaged in buying, candling, and selling eggs in Itta Bena, Mississippi (Pet. App. 18). It contends that, although it is engaged in interstate commerce, it is exempt from the wage provisions of the Act under Section 13(a)(10),

which provides a special exemption as to "individual[s] employed within the area of production (as defined by the Secretary)" in the handling of agricultural commodities (Pet. 4).[1] Under the Secretary's definition, an employee in an egg-handling establishment is employed within the "area of production" if 95 per cent of the eggs handled by the establishment come from normal sources of supply located within fifty air miles of the establishment (29 C.F.R. 536.2; Pet. 4–5). These sources may be "farms" or "farm assemblers or other establishments through which the commodity customarily moves" (*ibid.*).

At least 20 per cent of petitioner's eggs came from farms more than fifty air miles from petitioner's establishment, and were delivered there by the Greenwood Egg Company (Pet. App. 21). Petitioner contends that it qualifies for exemption under Section 13(a)(10), because Greenwood is a "farm assembler or other establishment" within the meaning of the Secretary's regulation and is located within fifty air miles of petitioner's establishment (Pet. 11).

Greenwood is a partnership owned by the vice-president and the secretary of petitioner (Pet. App. 21). It has no plant, office, or other establishment of its own, and no facilities for assembling eggs other than petitioner's establishment at Itta Bena (*ibid.*). Its trucks deliver the eggs direct from the farms to petitioner's establishment (*ibid.*).

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[1] The term "Secretary" was substituted for "Administrator" by Reorganization Plan No. 6 of 1950, 15 Fed. Reg. 3174, 64 Stat. 1263, 5 U.S.C. 133z–15.

The district court denied the injunction on the ground that petitioner was exempt from the Act under Section 13(a)(10). It added that, in any event, it would have denied the injunction because future violation of the Act was unlikely (Pet. App. 16).

The court of appeals reversed on the ground that Greenwood was not a "farm assembler" or "other establishment" within the meaning of the Secretary's regulation and that, accordingly, its deliveries of more than 5 per cent of petitioner's eggs from out-of-area farms disqualified petitioner from exemption under Section 13(a)(10). The court held, however, that the findings of fact as to the likelihood of future violation were "not clearly erroneous"; and it therefore remanded the cause with the instruction that "the district court, in its discretion, may decline to issue an injunction" (Pet. App. 21–22).

ARGUMENT

1. It is well settled that the burden is upon the employer claiming a special exemption under the Fair Labor Standards Act to show that he is "plainly and unmistakably within [the] terms and spirit" of the exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493. Petitioner completely failed to establish that it is entitled to the exemption. The court of appeals' interpretation of the phrase, "farm assemblers or other establishments through which the commodity customarily moves," not only accords with

the language of the regulation, but is required by the manifest intent of both the regulation and the statutory provision under which it was promulgated.

The purpose of the regulation and statute was to distinguish between processing establishments which obtain their supply from nearby agricultural sources, and those which draw on a more general market—only the former being deemed close enough to agriculture to share its special status of exemption from the Act. See *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 613–614; *Mitchell* v. *Budd*, 350 U.S. 473, 477–480. In promulgating his 1946 definition of "area of production" the Wage and Hour Administrator expressly stated that he was acting on the basis of that Congressional purpose. Findings of the Administrator, Dec. 18, 1946, CCH Lab. Law Rep. ¶ 23,282, p. 36,516. He noted that the task of determining the appropriate distances from the processing establishments to the producing farms was complicated by the fact that "some of the operations specified in the statute are two or more stages removed from the farm," and that at each successive stage "it is increasingly difficult to identify the farms on which the commodities had their origin" (*id.* at p. 36,518). For that reason, the Administrator explained, "[t]he 'distance' test was * * * drafted in terms * * * to include certain other establishments as well as farms" in determining what commodities came from within the area of production (*ibid.*).

This rationale for the inclusion in the regulation of "farm assemblers or other establishments through

which the commodity customarily moves" clearly does not apply to a supplier who picks up goods from distant farms and transports them by truck to the processor's plant, without pause for intermediate assembly, storage, or exhibition to customers at some establishment other than the processor's plant itself. It certainly does not apply where such a supplier is, like the supplier here, a partnership consisting of officers of the corporate processor and makes use of no facilities or offices other than the processor's. In these circumstances, there is no difficulty in determining exactly where the processor's supply comes from, and therefore no justification for disregarding the actual distance of the agricultural source. On the other hand, if, as petitioner contends, the regulation covers the situation involved here, the distance test provided by the regulation would be lax to the point of absurdity. Every processor could exempt himself from the wage provisions of the Act, however distant his farm sources, by simply arranging to get his farm products through an intermediary who owns a truck. There is nothing in the language of the administrative definition to require such a self-defeating result.

2. Petitioner contends that the court of appeals erred in remanding the case to the district court for a determination whether an injunction should be issued against violation of the Act. It reasons that the district court has already stated that, even if petitioner was not entitled to an exemption, the court would not issue an injunction since future violations are unlikely.

In remanding the case to the district court, the court of appeals did not grant the Secretary's request for an order directing the issuance of an injunction; it expressly instructed that "the district court, in its discretion, may decline to issue an injunction." Thus, on remand, if the district court should continue in its view that an injunction is not warranted, then petitioner will not have been injured by the remand. If, on the other hand, in the light of the appellate court's determination that petitioner is not exempt from the Act, the district court should determine that injunctive relief is appropriate, no injustice will have resulted.

There is no basis for petitioner's claim that the district court can cut off the court of appeals' power to remand the case for reconsideration, or its own power to exercise its judicial discretion in the light afforded by appellate exposition of the law. Congress has specifically provided in 28 U.S.C. 2106 that an appellate court could remand any cause for "such further proceedings to be had as may be just under the circumstances."[2] Here, the court of appeals properly decided that a remand was just and appropriate to allow the district court to determine whether it should

[2] 28 U.S.C. 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

issue an injunction after considering the court of appeals' determination that petitioner was not exempt from the Act.[3]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

CHARLES DONAHUE,
Solicitor,
JACOB I. KARRO,
Acting Assistant Solicitor,
CARUTHERS GHOLSON BERGER,
Attorney,
Department of Labor.
AUGUST 1962.

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[3] In *Baker* v. *Nason*, 236 F. 2d 483, 494 (C.A. 5), the court of appeals reversed and remanded for reconsideration even though "the Court below [had] stated that the case would be decided [the same way] independent of the finding of mutual fraud upon which the judgment rested."